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SUBJECT: CHINA'S ANTI-MONOPOLY LAW: A TOOTHLESS TIGER WHEN IT COMES  
TO SOES?

REF: BEIJING 02527

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11. (SBU) Summary: China's antitrust authorities and courts have  
been reluctant to use the country's Anti-Monopoly Law (AML) to curb  
anti-competitive behavior of state-owned enterprises (SOEs),  
according to a number of Chinese scholars, antitrust lawyers, and  
newspapers. Speaking at a Georgetown University forum in Beijing,  
one former Ministry of Commerce (MOFCOM) official compared the law  
to a "toothless tiger," criticizing the law's many exemptions for  
SOEs and lack of clear definitions. The AML's provisions on  
intellectual property (IP) "abuse" could be broadly interpreted,  
according to a Chinese scholar who is involved in drafting new AML  
guidelines on IP issues. MOFCOM's merger reviews have focused on  
transactions involving foreign firms, a trend that one Beijing-based  
antitrust lawyer predicted would continue. Nevertheless, recent  
cases involving SOEs TravelSky and China Mobile offer some  
encouraging signs that SOEs are not immune from the AML. In  
meetings with visiting U.S. Department of Justice (DOJ) and Federal  
Trade Commission (FTC) officials, China's three antitrust agencies  
expressed interest in strengthening cooperation and signing an MOU  
with U.S. antitrust agencies. End Summary.

Chinese Scholar Urges Action against SOE Monopolies  
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12. (SBU) Some of China's largest state-owned enterprises (SOEs) are  
violating the AML by abusing their dominant market position, Chinese  
Academy of Social Sciences (CASS) Economic Law Department Director  
Wang Xiaoye told an audience of 60 Chinese judges taking part in an  
October 26-30 antitrust seminar organized by DOJ, FTC, and China's  
Supreme People's Court (SPC). Wang, who was one of the legal  
experts involved in the drafting of the AML, said that China's  
antitrust agencies should curb the anti-competitive behavior of  
SOEs. She urged the judges, who represented the IP division of  
intermediate and higher courts throughout China, to take on cases  
that would help put a stop to anti-competitive behavior and protect  
consumer interests. Zhang Yuqing, a private lawyer and former  
MOFCOM Treaty and Law Department Director General, compared China's  
AML to a "toothless tiger," arguing that the law had too many  
exemptions for SOEs. Speaking at an October 9 forum sponsored by  
Georgetown University, Zhang said that the AML needed more detailed  
implementing rules to clarify definitions of such concepts as  
"national economic security."

AML Provisions on IP Abuse Remain Unclear  
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13. (SBU) One contentious area of the AML is Article 55, which stipulates that "this Law shall apply to the conduct of operators to eliminate or restrict market competition by abusing their intellectual property rights." Speaking at the antitrust seminar for judges, Shanghai Communication University law professor Wang Xianlin said that the AML, in general, was consistent with the U.S. legal philosophy that a firm does not derive market power merely by means of holding a patent. However, if a firm refuses to grant a patent for the development of an "essential" national standard, or grants the patent but then later demands "excessive" royalties, it could be subject to the AML. Wang, who is on a task force involved in drafting AML enforcement guidelines on IP issues, acknowledged that the AML was not entirely clear in its definition of "abuse" and that, as such, "abuse" could be broadly interpreted. CASS scholar Wang Xiaoye told the judges that antitrust agencies and courts had a responsibility to protect IPR. Noting that Microsoft's market dominance was the result of significant investment in R&D, Wang Xiaoye said forcing Microsoft to reduce prices for its software would reduce incentives for companies to innovate and ultimately hurt consumers.

#### Chinese Press: Competition Suffers as SOEs Advance

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14. (U) A number of Chinese newspapers have also criticized China's antitrust agencies and courts' reluctance to take on SOEs engaged in anti-competitive behavior, echoing similar complaints reported in refTel. An October 31 editorial in the Economic Observer, one of China's leading independent newspapers, criticizes the government's implementation of the AML. According to the editorial, the global financial crisis and government stimulus package have hurt

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competition by reinforcing the trend toward "the state advancing as the private sector retreats" (guojin mintui). The article quotes Chinese legal expert Tong Xindi, who argues that the AML has become a tool for the government to regulate industrial policy and foreign investment and for interest groups to restrict competition. Commenting on the power imbalance between China's powerful SOEs and relatively weak antitrust agencies, an unnamed official from a Chinese antitrust agency is quoted saying, "How can you expect a department-level authority to regulate ministry-level SOEs?"

15. (U) An October 22 article in the state-owned Economic Information Daily (Jingji Cankaobao) argues that AML lawsuits against large Chinese SOEs have yet to produce results because the courts are "extremely cautious" about these cases. Beijing lawyer Li Fangping filed lawsuits in 2008 against oil giant Sinopec and telecommunication service provider China Netcom for abusing their dominant market position, but the courts have yet to place the Sinopec case on file and have repeatedly postponed the China Netcom case because it "has great significance and requires careful study."

#### MOFCOM's Merger Reviews Focus on Foreign Firms

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16. (U) More than 70 percent of the mergers reviewed by MOFCOM since the AML went into effect August 1, 2008, have involved multinational firms. MOFCOM has reviewed 49 M&A transactions, approving 43 unconditionally and five with conditions. Only one case, Coke's bid to buy Chinese juice-maker Huiyuan, was rejected by MOFCOM. At the end of September, MOFCOM approved with conditions two major overseas transactions, Pfizer's acquisition of Wyeth in the pharmaceuticals industry and General Motors' reacquisition of elements of auto parts manufacturer Delphi. All five M&A cases approved with conditions involved offshore transactions between foreign parties rather than transactions between Chinese companies. MOFCOM has yet to formally reject or clear with conditions any such transactions between Chinese parties, although MOFCOM is reportedly reviewing the merger of state-owned China Eastern and Shanghai Airlines.

17. (SBU) MOFCOM's Anti-Monopoly Bureau is reportedly delaying action on Walmart's application to merge with Trustmart, a Taiwan-invested retail store. The basis of the delay is that Trustmart is currently

operating as a domestic Chinese company, and MOFCOM is apparently requiring that Trustmart first be converted to a wholly foreign-owned company prior to the conclusion of the AML review.

#### Antitrust Lawyers Expect Focus to Remain on Foreign Firms

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18. (SBU) Faced with limited staffing to investigate M&A cases and domestic pressure to protect Chinese companies, China's antitrust agencies were more likely to focus on transactions involving foreign companies, an antitrust lawyer at one of Beijing's leading law firms told EconOff October 29. She predicted that software companies like Microsoft would be a relatively easy target of China's antitrust agencies, given the fact that the Microsoft had already faced antitrust lawsuits in the United States and Europe. In an October 23 meeting, a Microsoft lawyer expressed concern about a possible antitrust investigation of "excessive pricing" of its software. However, he predicted that Microsoft was relatively safe for the next year, arguing that China's antitrust agencies would adopt a cautious approach and seek to avoid the international scrutiny that a case against Microsoft would attract.

#### Encouraging Signs: China Mobile and TravelSky Cases

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19. (SBU) Recent cases involving SOEs TravelSky and China Mobile offer some encouraging signs that SOEs will not continue to enjoy immunity from AML enforcement. In September, just six months after the state-owned airline ticketing website TravelSky introduced a controversial new air ticket pricing system, all of China's major airlines abandoned the TravelSky program and reverted back to the original pricing system. Criticized as an attempt among the major airlines to fix prices in China's domestic civilian aviation market, TravelSky's pricing system was under investigation by the National Development and Reform Commission (NDRC)'s Department of Pricing Supervision. Chinese independent weekly Economic Observer reported that NDRC was behind the demise of the pricing system. China's largest mobile phone operator, China Mobile, recently settled an anti-monopoly lawsuit filed by Beijing lawyer Zhou Ze, who accused

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the state-owned telecom operator of abusing market dominance in imposing a rental charge for its mobile service. China Mobile agreed to drop the monthly rental charge and provide a USD 150 "award" to the plaintiff, who in turn agreed to withdraw the suit on October 23. A Beijing-based antitrust lawyer told EconOff that China Mobile's decision to settle outside of court was a sign that the company expected to lose the case and wanted to avoid establishing a precedent that would trigger a flood of lawsuits. Nevertheless, she predicted that the case would likely lead to more lawsuits against the company.

#### FTC/DOJ Discuss Cooperation with China's Antitrust Agencies

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110. (SBU) In their October 23 meetings with DOJ Special Counsel for International Trade Stuart Chemtob and FTC Office of International Affairs Associate Director Russell Damtoft, officials from China's three antitrust agencies - MOFCOM, NDRC and the State Administration of Industry and Commerce (SAIC) - all expressed interest in strengthening cooperation and signing an MOU between U.S. and Chinese antitrust agencies. Damtoft informed MOFCOM Anti-Monopoly Bureau Division Directors Ye Jun and Yin Yanling that FTC would be happy to host a MOFCOM official for a 3-6 month internship in 2010. MOFCOM, NDRC and SAIC officials expressed appreciation for the U.S. Trade and Development Agency (TDA)-funded antitrust workshops held earlier this year and suggested that the next workshops on the concept of relevant market and IP and competition be held in China in early 2010. MOFCOM's Ye Jun said they did not want to hold the next TDA workshop until after the Chinese New Year and probably not until March 2010.

#### AML Implementing Regulations Still Being Drafted

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111. (SBU) NDRC Price Supervision Department Law and Regulations

Division Director Luo Zeheng told Damtoft and Chemtob that NDRC was in the process of developing procedural rules for AML implementation and hoped to announce those rules by the end of December. SAIC Legal Division Director Zhao Guobin said SAIC was still working on guidelines for AML enforcement in the area of IPR enforcement. He indicated that the fourth revision of the IP guidelines was still going through internal deliberations and was not ready for public comments. Zhao said SAIC would share the draft guidelines and welcome USG comments after the Anti-Monopoly Commission finished its review.

Comment

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¶12. (SBU) As we reported in reftel, the first 15 months of AML implementation offer some worrying signs. China's courts have been reluctant to take AML cases involving China's largest SOEs, while MOFCOM's Anti-Monopoly Bureau seems more focused on scrutinizing mergers involving foreign companies than those involving Chinese SOEs. Nevertheless, there are some encouraging new signs, such as the TravelSky and China Mobile cases and MOFCOM's decision to review the China Eastern and Shanghai airlines merger, that SOEs are not completely immune from the AML. Another positive sign is Chinese antitrust lawyers and scholars' willingness to criticize the government's AML implementation and their public calls for antitrust agencies to investigate SOEs' anti-competitive behavior. Ultimately, it is this domestic pressure that will compel antitrust authorities to make the AML a more effective tool for protecting competitive markets and consumer interests.

HUNTSMAN